Calendar No. 101

100TH CONGRESS
1st Session

SENATE

REPORT
100-47

PROVIDING FOR THE SETTLEMENT OF WATER RIGHTS CLAIMS OF THE LA JOLLA, RINCON, SAN PASQUAL, PAUMA, AND PALA BANDS OF MISSION INDIANS IN SAN DIEGO COUNTY, CALIFORNIA, AND FOR OTHER PURPOSES

APRIL 28 (legislative day, APRIL 21), 1987.—Ordered to be printed

---

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 795]

The Select Committee on Indian Affairs, to which was referred the bill (S. 795) to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 795 is to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians in San Diego County, California, and to provide for a sufficient amount of water to be made available in the San Luis Rey River basin to satisfy the water needs of all water users.

BACKGROUND

The Mission Indian Bands were settled on five small reservations in the San Luis Rey River basin under the authority of the 1891 Mission Indian Relief Act. The San Luis Rey River, the principal source of surface water in the area, rises in the Coast Ranges of northern San Diego County and flows westward along all five Indian reservations into the Pacific Ocean. The Bands claim a right to water for their reservations based on the Supreme Court's holding in *Winters* v. *United States*, 207 U.S. 564 (1908), which established that when Indian reservations were created, a sufficient amount of water was reserved to fulfill the purposes for which the

S413-2

reservation was established. Under western water law, the priority date for the beneficial use rights associated with an Indian reservation's claim to water is the date of the reservation's creation.

The genesis for the water rights claims by the Escondido Mutual Water Company arose in 1891, when the Escondido Irrigation District (Escondido Mutual Water Company's predecessor in interest) made several water filings under state law on the San Luis Rey River, appropriating water for use in the Escondido community. In 1894, the United States issued rights of way across Indian and Federal land to the Escondido Irrigation District for the construction of a gravity-flow canal known as the Escondido Canal. In 1894, the District issued bonds and in addition to the Canal, constructed diversion works, a reservoir in Bear Valley (now known as Lake Wohlford), and a distribution system to serve the Escondido community. Adverse economic conditions were compounded in 1903 by a fire which destroyed much of the upper canal. In 1905, the Escondido Irrigation District was dissolved in state court proceedings and all of its assets, including its water rights and rights of way, were acquired by the Escondido Mutual Water Company. In 1908, the Secretary of the Interior issued a right of way permit to Escondido Mutual Water Company, confirming the Company's canal rights of way across Federal and Indian lands including the San Pasqual, Rincon, and La Jolla Indian Reservations.

In 1911, William G. Henshaw purchased the 43,000-acre Warner Ranch on the upper San Luis Rey River. Henshaw planned to construct a large reservoir on the upper San Luis Rey River where the river crossed the western boundary of the ranch. After filing various notices of appropriations, Henshaw proceeded to secure agreements from all downstream riparian owners and appropriators for the construction of the reservoir. In 1912, because the Escondido Mutual Water Company was the largest appropriator on the San Luis Rey River, Henshaw entered into an agreement with the water company in which Escondido Mutual consented to the construction of a dam in return for certain water guarantees. In 1922, Henshaw entered into a contract with the United States which allowed Henshaw to construct a dam and reservoir on the upper San Luis Rey River. Later that year, Henshaw deeded the Warner Ranch to the San Diego County Water Company, and the San Diego County Water Company then contracted with the Escondido Mutual Water Company to coordinate the operation of the dam and reservoir with the operation of the Escondido Canal. In 1922 and 1924, the San Diego County Water Company entered into separate contracts with the Escondido Mutual Water Company and the Vista Irrigation District to sell them the water that was impounded behind Henshaw Dam. The plan was for the water to be released from the Dam into the San Luis Rey River, to flow down the river until it reached the diversion point of the Escondido Canal, to be transported by the Canal to Lake Wohlford, and from that point, the water would either be delivered to Escondido or transported via the Vista Flume to the community of Vista, California. In 1946, the Vista Irrigation District acquired all of the share of the San Diego County Water Company and thus succeeded to the ownership of Lake Henshaw, the lands of Warner Ranch, and all other rights developed by the Henshaw interests of the San Luis Rey River.

Meanwhile, in 1914, while Henshaw was continuing to secure consents from downstream riparian owners, the Escondido Mutual Water Company entered into a new contract with the United States on behalf of the Rincon Band. In return for certain guarantees of water and power to the Rincon Indian Reservation, the new contract permitted Escondido Mutual to erect and maintain a hydroelectric power plant on the Rincon Reservation and granted Escondido Mutual a right of way across the Rincon and San Pasqual reservations for power transmission and road facilities. Escondido Mutual constructed a power plant at Rincon and built a transmission line which linked that plant with a similar facility which it constructed on Escondido Mutual's own land at Bear Valley. In 1920, while applications for additional permits were pending before the Secretary of the Interior, the Federal Water Power Act was passed, and in 1921, the applications were tranferred to the Federal Power Commission. In 1924, the Commission granted Escondido Mutual a 50-year license for Project No. 176, which included the Escondido Canal, Lake Wohlford, the two power plants and all the necessary transmission lines, road, and telephone rights of way across Federal and Indian lands, including the La Jolla, Rincon, and San Pasqual Indian Reservations.

As a result of drought conditions in the 1950's, Escondido Mutual and Vista Irrigation District entered into a series of pumping agreements whereby Vista agreed to pump water from its Warner Ranch groundwater basin and deliver certain amounts of water to Escondido Mutual as well as to the community of Vista. In addition, both the Escondido and Vista communities secured rights to receive imported water from the Metropolitan Water District of Southern California and the San Diego County Water Authority. The City of Escondido joined in 1950 and the Rincon del Diablo and Bueno Colorado Municipal Water Districts joined the Metropolitan Water District of Southern California and the San Diego County Water Authority in 1954. Rincon del Diablo Water District includes the Escondido valley not included within the City of Escondido, and Bueno Colorado Water District includes the Vista Irrigation District.

In June 1969, the Rincon and La Jolla Bands filed an action in federal district court (*Rincon Band et al.* v. *Escondido Mutual Water Company, et al.,* Southern District of California, Civil No. 69-217-S) alleging that Escondido Mutual's water and right of way contracts, permits and licenses were void; seeking an injunction to prevent Escondido Mutual from taking additional water from the San Luis Rey River and damages. In July 1972, the United States filed a new action on behalf of the Rincon, La Jolla, San Pasqual, and Pala Bands of Mission Indians against Escondido Mutual Water Company and the Vista Irrigation District seeking damages for trespass and contractual relief (*United States* v. *Escondido Mutual Water Company, et al.,* U.S. District Court, Southern District of California, No. 72-271-S). In December 1972, the District Court consolidated the two suits with a similar suit against the Vista Irrigation District (*Rincon Band et al.* v. *Vista Irrigation District,* U.S. District Court, Southern District of California, No. 72-276-S). Thus, currently pending in the U.S. District Court for the Southern District of California are the three cases that have been

consolidated into one proceeding, *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, in which the Bands, and the United States on their behalf, as trustee for Indian lands and resources, seek to have all of the contracts and permits granting Escondido Mutual Water Company and Vista Irrigation District various rights of way and water rights appurtenant to the Mission Indians' land declared void, to adjudicate the Federal reserved water rights of the Bands, and to recover money damages from Escondido Mutual and Vista Irrigation District for their continuing use of water under allegedly invalid contracts beginning in 1894. Proceedings have been stayed pending the outcome of settlement negotiations among the parties and a potential legislative resolutions of the outstanding claims.

In addition to the federal court litigation, the parties are also involved in a proceeding before the Federal Energy Regulatory Commission. In 1969, the Bands filed claims before the Federal Power Commission (later to become the Federal Energy Regulatory Commission) seeking to block the proposed transfer of the license for Project No. 176. In 1971, Escondido Mutual also applied to the Federal Power Commission for a new 50-year license to operate Project No. 176. The Bands and the United States intervened, opposing the issuance of a license to Escondido Mutual. The Bands sought a non-power license. The United States supported the Bands' application, or in the alternative, sought federal takeover of the project. After lengthy hearings on the competing applications, an administrative law judge concluded that the project was not subject to the Commission's licensing jurisdiction because the power aspects of the project were insignificant in comparison to the project's primary purpose—conveying water for domestic and irrigation consumption. The Commission, however, reversed the administrative law judge's decision, and granted a new 30-year license to Escondido Mutual Water Company, the City of Escondido, and the Vista Irrigation District. The Commission ruled that section 4(e) of the Federal Power Act did not require it to accept without modification conditions which the Secretary of the Interior deemed necessary for the adequate protection and utilization of the Indian reservations. Accordingly, the Commission refused to prohibit the licensees from interfering with the Bands' use of a specified quantity of water, or to require that water pumped from a particular groundwater basin not be transported through the licensed facilities without the written consent of the five Bands. Other conditions proposed by the Secretary of the Interior were similarly rejected or modified. Second, although the Commission imposed some conditions on the licensees in order to preclude any possible interference or inconsistency of the power license with the purpose for which the La Jolla, Rincon, and San Pasqual reservations were created, the Commission refused to impose similar conditions for the benefit of the Pala, Pauma, and Yuima Reservations, ruling that its section 4(e) obligation in that respect applies only to reservations that are physically occupied by project facilities. The Commission also rejected the arguments of the Bands and the Secretary that a variety of statutes, including section 8 of the Mission Indian Relief Act, required the licensees to obtain the consent of the Bands before the license could issue.

On appeal, the Ninth Circuit Court of Appeals reversed the Commission's rulings and held that section 4(e) requires the Commission to accept without modification any license conditions recommended by the Secretary, subject to subsequent judicial review of the propriety of the conditions, and that the Commission is required to satisfy its section 4(e) obligations with respect to all of the reservations affected by the project and not just the three through which the canal passes. The court also held that section 8 of the Mission Indian Relief Act requires the licensees to obtain right-of-way permits from the La Jolla, Rincon, and San Pasqual Bands before using the licensees facilities located on the reservations. The Escondido Mutual Water Company, the City of Escondido, and the Vista Irrigation District filed a petition for certiorari in the Supreme Court.

The Supreme Court held that the court of appeals had correctly determined that the Commission was required to include in the license any conditions which the Secretary of the Interior deems necessary for the protection and utilization of the three reservations in which the project works are located. The Supreme Court also held that the Ninth Circuit erred in concluding that the Commission was required to fulfill its section 4(e) obligations with respect to the other three reservations affected by the project and that section 8 of the Mission Indian Relief Act empowered the Bands to prevent the licensing of facilities on their lands. The Court remanded the case to the Ninth Circuit, which in turn, remanded the matter to the Federal Energy Regulatory Commission, where the case is currently pending.

PROPOSED SETTLEMENT

The settlement is predicated on two objectives: division of local water and the costs associated with its development and distribution among the Bands, Escondido, and Vista; and purchase of Federally-developed Central Valley Project water by the Bands for delivery to the San Luis Rey River watershed, given the insufficiency of local supplies to meet the needs of the Indian and non-Indian communities.

Ninety percent of the locally-available water is presently used by Vista and Escondido. The remaining ten percent is allocated for use by the Bands. Under the proopsed settlement, local water would be shared equally, with a 50 percent allocation to the Bands, and the remainder to Vista and Escondido. Thus, the Bands will have the right to make beneficial use of approximately 9,000 acre-feet of local water annually, and to the extent that the local water is surplus to their needs, Escondido and Vista have agreed to purchase the first 7,000 acre-feet of surplus water for 90 percent of Escondido's and Vista's cost of obtaining water from an alternative source. Any remaining surplus water would be purchased for 80 percent of the cost associated with obtaining alternative source water.

In addition, to assure a reliable supply of local water in drought conditions, Escondido and Vista have agreed to guarantee the Bands a minimum of 7,000 acre-feet of local water per year to the extent that it is needed for the reservations. Costs of operating,

maintaining, and if necessary, replacing local distribution facilities will continue to be borne by Escondido and Vista, but the Bands will assume all costs associated with covering or placing underground, the portion of the Escondido Canal that crosses the San Pasqual Reservation. The Bands, Escondido and Vista would share the costs of operating, maintaining, replacing, and further developing the Warner Well Field facilities, with pumping power costs for the well field to be shared equally (50 percent by the Bands). The Bands would assume 40 percent of the operation and maintenance and new capital development costs.

Of the approximate one million acre-feet of the Central Valley federal reclamation project water that is not under contract, S. 795 authorizes the delivery of 22,700 acre-feet through existing facilities operated by the state of California, the Metropolitan Water District of Southern California, and the San Diego County Water Authority for allocation to the Bands. The Bands would assume all of the costs associated with the use of the existing facilities to convey the Central Valley Project water from the Sacramento-San Joaquin Delta to northern San Diego County. No new facility construction is necessary. The Bands will pay the Federal government the operation and maintenance component of costs at the irrigation project use rate for Central Valley Project water, and the capital component would be assumed by the Federal government as foregone revenue.

For the power required to transport the Central Valley Project water from the Delta over the Tehachapi Mountains to the reservations, the Bands will assume the operation and maintenance component of costs associated with project use power, and the capital component would be assumed by the Federal government as foregone revenue from the sale of surplus power. Given the present balance of available surplus power that would be used to satisfy the terms of the settlement, it is projected that there will be no impact on existing project use or commercial firm power customers receiving power under existing contracts.

S. 795 authorizes the establishment of an Indian Water Authority to lease, use or otherwise administer the Bands' water rights as confirmed by the settlement. Any lease or exchange of a water resource made pursuant to a contract by the Authority requires approval by the Secretary of the Interior, as trustee. The Bands agree to sell 6,000 acre-feet of the Central Valley Project water to Escondido and Vista at cost, in exchange for the commitment of those entities to assume the cost of operating and maintaining local distribution faciiities for use of water by the Bands. The bill precludes the Water Authority from permanently alienating any right to any water resource except to the local entities as part of the settlement agreement.

SUMMARY OF MAJOR COMMITTEE AMENDMENTS

Section 5(a)(5) was added in response to concerns expressed by the State of California and the Interior Department that the bill should address the issue of preemption of state water rights law. The State of California stated that while it generally opposes pre-

emption, it would not object to a limited preemption in the special and unique circumstances presented in this situation.

Section 5(a)(5) makes the Central Valley Project water provided by the Act generally subject to state law by incorporating Section 8 of the 1902 Reclamation Act. That provision, 43 U.S.C. § 383, states:

> Nothing in [the Reclamation Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws. * * *

The Committee believes that a limited preemption of state law is warranted in this unique situation, especially when that situation is viewed in light of the federal government's trust responsibility to the five Indian Bands and the special jurisdictional status of Indian property. The very purpose of this bill is to authorize and direct the Secretary of the Interior to provide uncontracted federal water developed by the Central Valley Project to the five Indian Bands in Southern California as the federal government's contribution to the overall settlement. That water will take the place of the local San Luis Rey River water that will be retained by the local entities under the terms of the overall settlement.

The bill's objective could be frustrated if the Bands or the federal government had to obtain the approval of the state to change the places of use, the purposes of use, or the points of diversion that are specified in the state water rights permits for the Central Valley Project. Obtaining approval for those changes potentially could involve many years of adversary proceedings before state administrative agencies and state courts which would undercut the principal purpose of the bill which is to put an end to the costly and lengthy litigation involving the waters of the San Luis Rey River. Accordingly, after incorporating Section 8 of the 1902 Reclamation Act, Section 5(a)(5) specifically provides an exemption from the state laws governing changes in those permits. In recommending this provision, the Committee was strongly influenced by the State of California's position that it would not oppose a partial preemption in these special and unique circumstances.

The specific exemption provided in Section 5(a)(5) is not intended to affect any other terms or conditions of the state water permits for the Central Valley Project. Its application is limited to the Central Valley Project water that is made available to the Indian Bands under this Act and only to the provisions in the state permits relating to the places of use, purposes of use, and points of diversion.

The changes in Sections 5(b)(3) and 5(b)(4) carry out Senator Cranston's suggestion that the bill be amended to protect all the rights and interests of Central Valley Project preference power customers under the terms of their existing contracts. A clause was added to both provisions to protect the existing right of the Sacramento Municipal Utility District to extend its contract through 2014. In addition, another change in Section 5(b)(4) addresses the

ambiguity noted in the statement of William H. Claggett, Administrator of the Western Area Power Administration, by making it clear that no added power costs incurred during the term of those existing contracts can be passed on following their expiration.

The State of California suggested that the bill be amended to provide an exemption from the federal reclamation laws, specifically the 1982 Reclamation Reform Act. The Committee considered this suggestions, but concluded that a general exemption in the statute from the federal reclamation laws for the use of the Central Valley Project water made available under the Act is not needed and would be superfluous.

Although the Central Valley was developed and is administered under the federal reclamation program, the Project water is being provided by the federal government as its contribution to the overall water rights settlement for the benefit of the five Indian Bands. That water takes the place of the local San Luis Rey River water claimed by the Bands and the United States, on behalf of the Bands, under the reserved water rights doctrine to which the local entities will become entitled under the terms of the settlement agreement. The Central Valley Project water therefore will be used for Indian purposes, either directly by the Banks or through sales by the Bands to others, not to carry out the purposes of the reclamation program. Accordingly, the prohibitions, restrictions and limitations of the Federal reclamation laws, including the 1982 Reclamation Reform Act, are not applicable and no general exemption in the statute from those laws is deemed necessary or appropriate under the circumstances.

California has a more specific concern regarding the use of non-federal facilities for the transportation of Central Valley Project water. In response to that concern, the Committee added a sentence to Section 9(c) of the bill. That new provision makes it clear that the use of non-federal facilities to transport the Central Valley Project water will not result in subjecting either those facilities or other water transported through those facilities to any federal law to which they would not otherwise be subject. The inclusion of this limited provision regarding the use of non-federal facilities for water conveyance purposes is not intended to affect in any way the general inapplicability of the federal reclamation laws to the Central Valley Project water provided to the five Indian Bands under the Act.

LEGISLATIVE HISTORY

S. 795 was introduced on March 19, 1987 by Senator Cranston, and was referred to the Select Committee on Indian Affairs. The same bill (S. 2676) was introduced in the 99th Congress (July 22, 1986), and was referred to the Select Committee on Indian Affairs with instructions that when reported, the bill be referred to the Committee on Energy and Natural Resources for a period not to exceed fifteen calendar days. A joint hearing of the Select Committee on Indian Affairs and the Energy and Natural Resources Committee on Indian Affairs and the Energy and Natural Resources Committee was held on S. 2676 on August 11, 1986. All parties to the settlement testified in support of enactment of S. 2676.

A companion bill, H.R. 3958, was introduced in the House of Representatives in the 99th Congress by Congressman Ron Packard on December 16, 1985, and was referred to the Subcommittee on Water and Power Resources of the House Interior and Insular Affairs Committee. Congressman Packard introduced a companion bill to S. 795 (H.R. 1699) on March 18, 1987. H.R. 1699 was referred to the Water and Power Resources Subcommittee of the House Interior and Insular Affairs Committee. No further action on the bill has been taken in the House.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on April 9, 1987, by a unanimous vote of a quorum present, recommends that the Senate pass S. 795, as amended.

COMMITTEE AMENDMENTS

The Committee amended the title of the San Luis Rey Indian Water Authority to read: the San Luis Rey *River* Indian Water Authority.

The Committee amended the reference in section 6(c) to section 7871(a)(4) of the Internal Revenue Code of 1954 to read: the Internal Revenue Code of 1986.

SECTION-BY-SECTION ANALYSIS OF S. 795

Section 1. Short Title

This Act may be cited as the "San Luis Rey Indian Water Rights Settlement Act".

Section 2. Definitions

Section 2 defines the following terms as used in this Act: "Bands", "Central Valley Project", "Firm Project Water", "Indian Water Authority", "Local Entities", Project Use Power", "San Diego Aqueduct", and "Settlement Agreement".

Section 3. Congressional Findings; Local Contributions; Purpose

(a) Congressional Findings.—Subsection 3(a) provides the background for the Act by describing the underlying problem and the solution which the Act will allow to be implemented. Paragraphs (1) through (3) describe the Indian Reservations' need for a reliable source of water, the local entities' reliance and dependency on water from the San Luis Rey River, and the inadequacy of the San Luis Rey River to supply the needs of both the reservations and the local entities. Paragraphs (4) and (5) describe some of the problems that have been caused by the litigation and that will continue in the absence of a negotiated settlement. Paragraphs (6) and (7) indicate that the parties have reached an agreement in principle and outline the major provisions of the settlement that the bill will allow to be implemented, including the equal division of the local water between the Bands and the local entities [subparagraph (7)(A)], the minimum annual supply guaranteed by the local entities to the Bands [subparagraph (7)(B)], the contribution of local facilities and payment of operation, maintenance, and replacement costs [subparagraphs (7) (C) and (E)], and the local entities' obliga-

tion to purchase as much of the Bands' local water as the Bands do not need [subparagraph (7)(D)].

(b) Purpose.—Subsection 3(b) describes the Act's purpose as being to provide for the settlement of the Bands' reserved water claims in a fair and just manner which gives the Bands a reliable water supply, promotes conservation and wise use of the local water, replaces the adversary relationship between the Bands and the local entities with a mutually beneficial partnership, and fosters the development of an independent economic base for the Bands.

Section 4. Settlement of Water Rights Dispute

Section 4 provides that the operative sections of the Act—section 5 (providing for the delivery of Central Valley Project (CVP) water to the Bands), section 6 (recognizing the status and general powers of the Indian Water Authority), section 7 (describing the specific powers of the Indian Water Authority and the Bands over their water and power resources), and section 8 (authorizing the Secretary of the Interior, with tribal consent, to transfer title to tribal lands as necessary for the efficient operation of the non-Indian local water facilities involved in the settlement)—will not take effect until the settlement between the Bands and the local entities has been finalized and all of the legal requirements necessary for its implementation have been satisfied. This section is necessary to protect all entities involved—the Bands, Escondido, Vista, and the United States itself—from incurring obligations they would not otherwise have or prejudicing themselves in the underlying litigation if S. 795 becomes law but something prevents the settlement from ever being implemented.

In order for the proposed settlement to reach fruition, a number of independent tasks must be accomplished. In addition to the passage of this Act, these tasks include negotiating contracts with the State of California Department of Water Resources, the Metropolitan Water District of Southern California, and the San Diego County Water Authority for conveyance of the CVP water provided by the Act through facilities which these entities own to the area of the Indian reservations; and executing a final settlement agreement among the Bands, the United States, Escondido, and Vista which implements the agreement in principle. All of these actions are to some extent interdependent, and a final settlement agreement cannot be executed unless all of the other tasks are accomplished.

Section 5. Duties of the United States and the Indian Water Authority with Respect to Delivery of Water

Section 5 defines the extent and limitations of the obligations of the United States to provide Central Valley Project water and associated power to the Indian Water Authority and of the Indian Water Authority's obligations to pay for the water and the costs of conveying it to the area of the reservations.

(a) Delivery of Water.—

(1) In General.—Subsection 5(a)(1) sets forth the basic requirement that the Secretary of the Interior deliver 22,700 acre-feet of Central Valley Project water per year to the Bands. It specifies that the water be delivered through "Federal and non-Federal fa-

cilities" to "a point in the San Diego Aqueduct" to reflect the facts that federal conveyance facilities do not extend all the way to San Diego County, and that facilities owned by the State of California, the Metropolitan Water District of Southern California, and the San Diego County Water Authority will have to be used to convey the water from the federal facilities where it originates to its final destination. Later provisions (see subsection 5(a)(3) (A) and (B) and 9(c)) make it clear that S. 795 is not intended to authorize or require the construction of additional federal facilities or the condemnation or nonconsensual use of any nonfederal facilities.

The provision in subsection 5(a)(1) stating that a delivery schedule is "to be agreed upon by the Secretary of the Interior and the Indian Water Authority" reflects the fact that in order for the water to produce the intended benefit at the anticipated cost a number of factors which vary from month to month and even day to day will have to be considered on an ongoing basis, including availability of water and power, availability of conveyance capacity, demand, and price fluctuations. This provision is intended to assure that delivery of the water will be scheduled so as to accommodate the requirements of both the United States and the Bands and is satisfactory to the State, the Metropolitan Water District, and the San Diego County Water Authority.

(2) Obligations of the Indian Water Authority.—Subsection 5(a)(2) sets forth the obligations of the Indian Water Authority with respect to the CVP water.

(A) Operation and Maintenance.—Subsection 5(a)(2)(A) specifies the method for determining the price which the Bands will have to pay for the CVP water which is delivered to them pursuant to the Act. The rate charged by the United States for CVP water is based upon two cost components: the capital cost of constructing the facilities used to produce and deliver the water and the operation and maintenance cost of those same facilities. The method used to determine these cost components is different for different types of water. This subsection requires that the Bands pay only the operation and maintenance component of the water cost, and that they pay it at the rate charged for irrigation water. The capital cost component will become a nonreimbursable cost to the United States. This will assure that the rates charged to other CVP water and power customers will not increase as a result of the Bands not being required to pay this cost component. (See discussion of subsection 5(a)(4), below.)

(B) Conveyance.—Subsection 5(a)(2)(B) makes it clear that it is the Bands' responsibility, not that of the United States, to pay all costs associated with the use of the non-Federal facilities that will be required to deliver the CVP water from the Sacramento-San Joaquin Delta to the area of their reservations. (See discussion under section 4 and 5(a)(1), above.) It further makes clear that the Bands will be solely responsible for the payment of all costs, including construction costs, associated with conveying the CVP water from its point of delivery in the San Diego County Water Authority's aqueduct to their reservations.

(3) Limitations on Water Delivery Obligation.—Subsection 5(a)(3) sets forth specific limitations on the United States' obligation to deliver CVP water to the Bands.

(A) Subsection 5(a)(3)(A) relieves the United States of any obligation under the Act to deliver CVP water to the Bands if such delivery would require the construction of any new federal facilities. As discussed under sections 4, 5(a)(1), and 5(a)(2)(B), above S. 795 contemplates that the CVP water will be delivered from the Delta to the area of the reservations using non-federal facilities. It also contemplates that any facilities that may be constructed in the future to deliver the water from the existing non-federal facilities to the reservations will be paid for by the Bands and not by the United States.

(B) Subsection 5(a)(3)(B) relieves the United States of any obligation under the Act to deliver CVP water to the Bands if the consent of the owners and operators of the non-federal facilities that will be needed to deliver the water cannot be obtained. It is also intended to make it clear that S. 795 does not authorize the use of the power of eminent domain to obtain the use of these non-federal facilities.

(C) Subsection 5(a)(3)(C) relieves the United States of any obligation under the Act to deliver CVP water to the Bands until the necessary contracts and permits have been executed or amended. (See discussion under section 4, above.)

(4) Limitation on Additional Water Costs.—Subsection 5(a)(4) makes it clear that the provision of 22,700 acre-feet of CVP water to the Mission Indians under S. 795 is intended to be done in such a way that it will not result in increased costs to any other Central Valley Project water customers.

(5) Relationship to State Laws.—Subsection 5(a)(5) provides that nothing in the Act or any other law is to require compliance with state laws governing changes in the places of use, purposes of use, or points of diversion of the water described in this subsection in the water rights permits for the Central Valley Project. Subsection 5(a)(5) makes the Central Valley Project water provided by the Act generally subject to state law by incorporating section 8 of the 1902 Reclamation Act.

(b) Use of Project Use Power for Pumping.—

(1) In General.—Subsection 5(b)(1) sets forth the basic requirement that the Secretary of the Interior use project use power from the Central Valley Project to deliver the Bands' 22,700 acre-feet of CVP water from the Sacramento-San Joaquin Delta to the area of the reservations. Of the various classifications into which power associated with the Central Valley Project is placed, "project use" power is second in priority only to "station service" power (power needed to run the project's powerplants and switchyards). It is generally defined as that power which is used to deliver first lift irrigation water to project irrigation customers and for other specifically authorized purposes. Since the power provided by S. 795 can be used to only deliver project water to a point in the main trunk water transmission facilities in the area of the reservations, it serves the same purpose as conventional "project use" power and is therefore classified as such.

As is normally the case with project use power, at those times when the Central Valley Project hydroelectric facilities are not generating enough power to satisfy demand, the Secretary of Energy is authorized to obtain the necessary power from other

sources. As is discussed below under subsection 5(b)(3), it is contemplated that the Secretary will normally use power purchased from the Pacific Northwest that would otherwise be banked with Pacific Gas & Electric Company under Contract 2948A for this purpose. However, it was thought to be unwise to make this a requirement of the Act for fear that it might unnecessarily restrict the Secretary from using a lower cost alternative should one become available.

(2) Obligations of the Indian Water Authority.—Subsection 5(b)(2) specifies the method for determining the price which the Bands will have to pay for the project use power which is used to deliver CVP water to them. The price charged by the United States for all CVP project use power is based upon two cost components: The capital cost of constructing the facilities used to produce the power and the operation and maintenance cost of those same facilities. This subsection requires that the Bands pay only the operation and maintenance component of the power cost, and that they pay it at the rate charged for project use power used to deliver irrigation water.

The capital cost component will become a nonreimbursable cost to the United States. This will assure that the rates charged to other CVP water and power customers will not increase as a result of the Bands not being required to pay this cost component.

(3) Limitation on Use of Certain Power.—Subsection 5(b)(3) restricts the resources on which the Secretary of Energy can draw to satisfy the power requirements of the Act by limiting the Secretary to that power that is not needed for other specified purposes as follows:

(A) Subsection 5(b)(3)(A) prohibits the Secretary from using for purposes of this Act any power that is needed for other project use purposes. As discussed under subsection 5(b)(1), above, next to station service power, project use power has the highest priority of any power associated with the Central Valley Project. While it is a purpose of this Act to use the highest priority power feasible to deliver the Bands 22,700 acre-feet of water per year to them, it is also a purpose of this Act not to interfere with the CVP water users within the project's existing service area. Subsection 5(b)(3)(A) helps accomplish this second purpose by subordinating the power provided to the Bands by the Act to the needs of the other CVP water users. This provision not only will protect the supply of project use power available to these other CVP water users, it will also prevent the Act from adversely affecting the price they pay for this power.

(B) Subsection 5(b)(3)(B) prohibits the Secretary from using for purposes of this Act any power that is needed by Central Valley Project firm power customers to the extent of any existing contract or obligation to them, or for any additional period as may be covered by an existing contract or obligation. Next to station service power, project use power has the highest priority of any power associated with the Central Valley Project. The next highest priority is given to "commercial firm" (often called "preference") power. The Central Valley Project was planned to generate more power than would be needed for project uses so that the federal government could use the revenues from the sale of this additional power

to repay the capital investment in the power facilities (plus interest), annual power operation and maintenance costs, and a portion of the investment in irrigation facilities that is beyond the ability of the irrigators to repay. The power that is so used is called "commercial firm" power and is sold by the federal government under a series of long term power sales contracts to various federal and state agencies and public utilities who are given a "preference" entitlement to it. The rates which these preference customers pay are periodically adjusted to provide sufficient revenue to recover the above mentioned costs, but are low in comparison to the rates that would have to be paid to obtain power from alternative sources.

In part because the Central Valley Project is operated primarily for the production of water and only secondarily for the production of power, project generated power is not always available when it is most needed. The federal government purchases additional power from other sources—mainly the Pacific Northwest—but this by itself still does not always bring supply and demand into balance. At some times, more power is available than is needed to satisfy the needs of both the project use and the preference customers, and at others there is a shortfall. To solve this problem, the federal government has entered into an arrangement with Pacific Gas & Electric Company known as "Contract 2948A". Under this arrangement, the federal government sells power that is surplus to its needs to Pacific Gas & Electric Company, which "banks" it until there is a shortfall, at which time the federal government buys it back at a price determined by the application of a complex formula.

It was originally thought that the power banked and the power withdrawn under Contract 2948A would, on average, balance. However, in practice, much more power has been banked than has been withdrawn. As a result, the Department of Energy advises that sufficient power can be made available to satisfy the requirements of S. 795 without using power that would otherwise be provided to conventional project uses or to existing preference customers.

Thus, the Act contemplates that in satisfying the power requirements of subsection 5(b)(1), the Secretary of the Interior and the Secretary of Energy will use only power that would otherwise be "banked" under contract 2948A (or less expensive power if it becomes available—see discussion under subsection 5(b)(1)) until the expiration of that contract and the last of the preference contracts and obligations. After that, new preference contracts and a new banking arrangement will have to be negotiated even without the Act, and the Act imposes no restrictions on the federal government.

Subsection 5(b)(3)(B) carries out this intention by protecting the power supply (and indirectly the price) available to existing CVP preference power customers to the extent of their existing rights, but only until those rights expire.

(4) Limitation on Additional Power Costs.—To the extent that subsection 5(b)(3) may not already do so, subsection 5(b)(4) makes clear that the Act's provision of 22,700 acre-feet per year of CVP water and the project use ower necessary to deliver it to the area of the reservations will not result in power costing more than it would in the absence of the Act.

(A) Subsection 5(b)(4)(A) requires the Secretary of the Interior and the Secretary of Energy to take such steps as are necessary to assure that the Act not result in any increase in the rate charged for project use power. As discussed under subsection 5(b)(3)(A), above, this Act is not intended to interfere with CVP water users within the existing service area of the Central Valley Project. Just as it is not intended to result in any decrease in the supply of project use power available for use in the delivery of their water (subsection 5(b)(3)(A)), so it is also not intended to result in any increase in the price they pay for that project use power (subsection 5(b)(4)(A)).

(B) Subsection 5(b)(4)(B) requires the Secretary of the Interior and the Secretary of Energy to take such steps as are necessary to assure that the Act not result in any increase in the rate charged to existing Central Valley Project preference power customers, to the extent of their existing contracts and rights for commercial firm power, and further provides that no additional power costs incurred during the term of any existing contract or obligation is to be accrued or passed on Central Valley Project firm power customers following the expiration of a contract or obligation. The Act is not entended to interfere with the existing rights of existing Central Valley Project preference customers. Just as it is not intended to result in any decrease in the supply of commercial firm power available to them until their existing rights expire, (subsection 5(b)(3)(B)), so it is also not intended to result in any increase in the price they pay for that commercial firm power until those rights expire (subsection 5(b)(4)(B)).

(c) Delegation of Authority.—Subsection 5(c) delegates general authority to the Secretary of the Interior and the Secretary of Energy to enter into such agreements and take such other steps as they deem appropriate to fulfill their obligations under the Act. Implementation of the Act and the settlement may require actions beyond those specifically authorized by the Act. This subsection makes it clear that Congress is exercising its plenary authority over Indian affairs and granting the Secretaries of Energy and the Interior broad authority to exercise their discretion and take such steps as are necessary to carry out the intent of the Act and settlement.

Section 6. Establishment, Status, and General Powers of San Luis Rey River Indian Water Authority

(a) Establishment of Indian Water Authority Approved and Recognized.—

(1) In General.—The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands have joined together, formed and chartered the San Luis Rey River Indian Water Authority as a permanent, intertribal entity pursuant to identical ordinances adopted by all five Bands. The Bands' willingness to work together and to establish the Indian Water Authority as their common agent is crucial to the implementation and success of the overall settlement. The Bands' share of the San Luis Rey River water, as well as the water from the Central Valley Project, will be shared by all five Bands, so it is essential that they have a common mechanism for manag-

ing and administering those valuable resources and the income derived from them.

Subsection 6(a)(1) recognizes and approves the establishment by the Bands of the Indian Water Authority and the power of the Indian Water Authority to act for the Bands. Congress' recognition and approval of the Authority's existence and powers precludes any subsequent challenge to the validity of either the ordinances establishing the Authority or its power to act for the Bands. It also provides third parties contracting with the Authority with the necessary assurance that the Authority has the status and the power to act as the agent for the five Bands.

(2) Limitation on Power to Repeal or Revoke Ordinances.—Because the existence of the Indian Water Authority is so critical to the implementation of the overall settlement contemplated by the Act, subsection 6(a)(2) provides that the Bands' ordinances establishing the Authority cannot be revoked or repealed and that the powers delegated to the Indian Water Authority cannot be surrendered except by Act of Congress. Section 17 of the 1934 Indian Reorganization Act, 48 Stat. 984, 988, 25 U.S.C. § 477, contains a similar provision preventing the revocation or cancellation of the charters of certain business corporations established by Indian tribes without the consent of Congress.

(3) Limitation on Power to Amend or Modify Ordinances.—Subsection 6(a)(3) provides that the Secretary of the Interior must approve any proposed modifications of the ordinances establishing the Indian Water Authority. It also requires that the Secretary withhold his approval unless he finds that the proposed modification will not interfere with or impair the ability of the Indian Water Authority to carry out its responsibilities and obligations. The purpose of this provision is to insure the continued and perpetual viability of the Indian Water Authority and to provide further protection to those who contract with it.

(b) Status and General Powers of Indian Water Authority.—

(1) Status as Indian Organization.—Subsection 6(b)(1) states that the Indian Water Authority shall be treated as an Indian entity under federal law with which the United States has a trust relationship to the extent provided in the Bands' ordinances. This provision insures that the Authority will be considered the Bands' agent and that its relationship with the federal government and other entities will be governed by the same laws and principles that apply to their relationships with the Bands.

(2) Power to Enter Into Agreements.—Subsection 6(b)(2) insures that the Indian Water Authority has the power to enter into all agreements that it deems necessary to carry out the provisions of the Act and the settlement agreement.

(3) Investment Power.—Subsection 6(b)(3) provides that the Indian Water Authority shall have complete discretion and power to invest and manage its funds. It may seek financial advice from the Bureau of Indian Affairs as well as others. It may also choose to have the Bureau of Indian Affairs act as the trustee and manager of its funds in the same way that the Bureau now manages the funds that are held in trust for other tribes. But the Indian Water Authority is granted the power to invest and manage its funds in the ways that it deems to be in the best interests of the Bands.

This means, of course, that the Indian Water Authority bears the responsibility for, and must accept the consequences of, its decisions. The United States will not be liable for any financial losses resulting from the Bands' investments that are not managed by the Bureau of Indian Affairs.

(4) Limitation on Spending Authority.—The purpose of subsection 6(b)(4) is to insure that most of the funds received by the Indian Water Authority are used for the economic development of the Bands, their lands and their members. The only exceptions are for the Authority's administrative or operational expenses and the fulfillment of the Authority's obligations under this Act, the settlement agreement, and any other contracts. This subsection expressly prohibits the use of the Authority's funds for per capita payments to the members of any Band.

(c) Indian Water Authority Treated as Tribal Government for Certain Purposes.—Under the Indian Tribal Government Tax Status Act, 96 Stat. 2607, Indian tribes are treated as states for certain specified purposes. Subsection 6(c) of S. 795 provides that the Indian Water Authority shall be considered an Indian tribal government for the specific purpose of issuing tax-exempt bonds pursuant to one of the provisions of the Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871(a)(4).

Section 7. Powers of Indian Water Authority and Bands Over Water and Power Resources

(a) Use of Water.—Subsection 7(a) provides that the Bands and the Indian Water Authority have the right to devote their share of the local San Luis Rey River water resources, the imported water from the Central Valley Project, and any other water they may have or acquire to any beneficial use. Thus, the Bands' and Indian Water Authority's right to use their local and imported water is not subject to any restrictions, prohibitions or limitations which favor one kind of beneficial use over any other. This subsection satisfies one of the prime objectives of the Act: to provide maximum flexibility to enable the Bands and the Indian Water Authority to make optimum use of all of their water resources. It means that if the highest and best use of their water is for recreation or commercial purposes rather than agricultural, the Bands and the Indian Water Authority have the right to use it for those purposes.

(b) Disposition of Water.—

(1) In General.—Subsection 7(b)(1) authorizes the Bands and the Indian Water Authority to use or otherwise dispose of their local and imported water resources on or off their reservations. This subsection also encourages optimum economic utilization of the Bands' resources. The Band and the Indian Water Authority may consent to restrictions on the use or other disposition of any or all of their water, and it is anticipated that they necessarily will do so as part of the settlement agreement with Vista and Escondido, and the agreements contemplated with the State of California Department of Water Resources, the Metropolitan Water District of Southern California, and the San Diego County Water Authority.

(2) Restriction on Alienation of Water Rights.—Subsection 7(b)(2) prohibits the Indian Water Authority from permanently alienating any right to the local or imported water resources except for the

water that is committed to the local resources except for the water that is committed to the local entities as part of the settlement agreement. This restriction on alienation is comparable to the way in which federal Indian law treats tribal lands: they are subject to long-term leases but they cannot be sold. This provision insures that the Bands and the Indian Water Authority will have the opportunity to review and revise their decisions for the benefit of future generations in light of changed circumstances and the knowledge and experience gained during the intervening period.

(3) Approval of Water Contracts by Secretary.—Subsection 7(b)(3) provides that contracts for the sale, lease or exchange of the local and imported water resources shall be entered into by the Indian Water Authority and are subject to the approval of the Secretary of the Interior in his capacity as trustee for the Authority.

(c) Contracts Relating to Power.—Subsection 7(c) empowers the Indian Water Authority to enter into contracts relating to the power provided pursuant to subsection 5(b)(1) of the Act. Such contracts are limited to arrangements that are necessary to provide for the pumping and delivery of the firm project water provided pursuant to subsection 5(a)(1). The power cannot be used for any other purposes. (See also discussion under subsection 9(b).) The power contracts entered into by the Indian Water Authority also are subject to the approval of the Secretary of the Interior.

Section 8. Secretary of the Interior's Exclusive Authority Over Government and Indian Lands.

(a) In General.—At the heart of the dispute which this Act is intended to help resolve are contracts executed by the Secretary of the Interior on behalf of the Bands which the United States and the Bands now contend in the district court litigation were "void ab initio" because the Secretary of the Interior was not then authorized to transfer the Bands' property rights. Subsection 8(a) is intended to make clear Congress's exercise of its plenary power over Indian affairs and Indian reservations in delegating to the Secretary of the Interior the authority to alienate Indian lands to the extent necessary to allow for the efficient and convenient operation, maintenance, repair, and replacement of the local water storage, diversion, and related facilities presently operated by Escondido and Vista, including the Rincon and Bear Valley powerplants. By its additional reference to "or any land subject to the authority of such Secretary", subsection 8(b) is intended to make clear that its delegation of authority to the Secretary of the Interior for the above purposes is intended to be applied to all lands under the Secretary's jurisdiction. This subsection is thus intended to eliminate the necessity of obtaining repeated Congressional authorizations for alienating lands for the described purposes.

The delegation of authority to the Secretary of the Interior in section 8(a) is made "exclusive" and "not withstanding any other provision of law" to make it clear that there is no duplicative or overlapping regulatory jurisdiction with the Federal Energy Regulatory Commission or any other federal agency. The overall settlement contemplated and authorized by this legislation will be permanent. The lands, water rights and facilities used for the development of the local San Luis Rey River water supply therefore must

be exempt from the licensing jurisdiction of the Federal Energy Regulatory Commission because by statute the Commission's licenses are limited to a maximum of 50 years. Once the Secretary of the Interior issues the necessary leases, rights-of-way or deeds for the diversion and storage facilities, the San Luis Rey River storage and conveyance system and associated power facilities will be exempt from the Federal Power Act.

(b) Approval by Indian Bands; Compensation to Indian Owners.—Subsection 8(b) places just one limitation and one qualification on the broad delegation of authority to the Secretary of the Interior set forth in subsection 8(a).

The limitation is the requirement that any disposition of Indian tribal or allotted land by the Secretary of the Interior under subsection 8(a) be subject to the approval of the governing Indian Band. It is assumed that such consent will not be unreasonably withheld, and the settlement agreement between the parties should so provide.

The qualification is that any individual Indian owner or allottee whose land is disposed of pursuant to subsection 8(a) be entitled to receive just compensation from the Indian Water Authority or the local entities. This provision is not intended to give any such individual Indian the right to prevent the disposition of land, but only to require the payment of just compensation. Whether the compensation obligation runs to the Indian Water Authority or the local entities or is apportioned between them will depend upon the reason the land is acquired and the terms and conditions of the settlement agreement. Just compensation is not required for the use of tribal lands because under the settlement agreement the San Luis Rey River diversion and storage facilities will be utilized and operated with the Bands' consent and for their benefit.

Section 9. Rules of Construction

(a) Reserved Water Rights.—(1) Subsection 9(a)(1) states the intention that this Act not affect in any way the determination of certain questions of law relating to the uses to which reserved water may be put in connection with Indian reservations other than the La Jolla, Rincon, San Pasqual, Pauma, and Pala Reservations.

(2) Subsection 9(a)(2) states the intention that this Act not affect in any way the determination of certain questions of law relating the uses to which reserved water may be put in connection with the La Jolla, Rincon, San Pasqual, Pauma, and Pala Reservations in the absence of this Act or if the settlement agreement does not become effective.

(b) Limitation on Sales or Dispositions of Power.—Subsection 9(b) states the intention that this Act not be construed as authorizing the Bands to sell or dispose of any of the power provided by the Act separately from the 22,700 acre-feet of water. This limitation is not, however, intended to restrict the Bands' ability to use power banking, exchange, and similar types of agreements with the operators of water conveyance facilities like the State of California or the Metropolitan Water District so as to make the most efficient and effective use of the power in the conveyance of their water.

(c) Eminent Domain and Application of Federal Laws.—It is recognized that water conveyance facilities owned by the state of California Department of Water Resources, the Metropolitan Water District of Southern California, and the San Diego County Water Authority will be needed in order to deliver the 22,700 acre-feet of Central Valley Project water provided by the Act from the Sacramento-San Joaquin Delta to the area of the Bands' reservations. Subsection 9(c) makes clear the intent that the use of those facilities be obtained solely on a voluntary basis by agreement of their owners, and that the Act does not authorize the use of the federal power of eminent domain to obtain their use. The subsection further provides that the transportation of the water provided pursuant to the Act through non-Federal facilities shall not subject those facilities or other water transported through those facilities to any federal law to which they would not otherwise be subject. The inclusion of this provision regarding the use of non-Federal facilities for water conveyance purposes is not intended to affect in any way the general inapplicability of the federal reclamation laws to the Central Valley Project water provided to the five Indian Bands under the Act

(d) Status and Authority of Indian Water Authority.—Subsection 9(d) states the intention that this Act not affect in any way the determination of any questions of law relating to the status or authority of the Indian Water Authority in the absence of this Act or if the settlement agreement does not become effective.

Section 10. Compliance with Budget Act

Section 10 makes it clear that any new spending authority provided in the Act shall be effective for any fiscal year only to the extent and in the amounts provided in advance in appropriation Acts. This provision is included to comply with the Congressional Budget Act of 1974.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 795, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 22, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 795, the San Luis Rey Indian Water Rights Settlement Act.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 795.
2. Bill title: San Luis Rey Indian Water Rights Settlement Act.
3. Bill status: As ordered reported by the Senate Select Committee on Indian Affairs, April 9, 1987.
4. Bill purpose: S. 795 provides for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians in San Diego County, California. The bill estimates the San Luis Rey Indian Water Authority and sets forth its powers and duties.
5. Estimated cost to the Federal Government: S. 795 would result in a loss of receipts to the federal government, which would have the following direct spending effect on the budget.

[By fiscal years, in millions of dollars]

	1988	1989	1990	1991	1992
Estimated Budget Authority	2.5	2.6	2.7	2.9	3.0
Estimated Outlays	2.5	2.6	2.7	2.9	3.0

The costs of this bill fall within the budget functions 270 and 300.

Basis of estimate: The costs to the federal government arise from two sources: forgone water and power receipts. The bill provides for reimbursement by the Bands of operation and maintenance costs, but not construction costs, incurred by the federal government in delivering water from the Central Valley Project. No additional construction is required to provide the water, but the construction component of the cost charged for delivery will be absorbed by the federal government. Based upon information provided by the Department of the Interior, CBO estimates that forgone water receipts will total about $40,000 annually.

The bill also requires the federal government to provide the power necessary to deliver the water from the Sacramento-San Joaquin Delta to the Indian Water Authority. This power would normally be sold as surplus power to the Pacific Gas and Electric Company, but would be made available to the tribe at the project use rate, which is below the rate charged for surplus power. Based upon information provided by the Western Area Power Administration, CBO estimates that provision of this power to the authority would result in forgone receipts of about $2.5 million in 1988, and gradually increasing amounts in subsequent years.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Paul M. DiNardo.
10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carry-

ing out the bill. The Committee believes that S. 795, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received a legislative report on S. 2676 in the 99th Congress from the Department of Justice, and statements on S. 2676 from the Department of the Interior and the Department of Energy. These legislative reports are set forth below. No communications from the Administration on S. 795 have been received in the 100th Congress.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, August 11, 1986.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: By letter dated July 29, 1986, you advised the Department of Justice that the Senate Select Committee on Indian Affairs and the Committee on Energy and Natural Resources have scheduled a joint hearing on S. 2676 on August 11, 1986. S. 2676 is a bill to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians, and for other purposes. In lieu of testimony, by prior agreement with your Committee, this Department submits this report on S. 2676. For the reasons set forth below, this Department recommends enactment of this legislation.

Background

S. 2676 is designed to bring to a close all pending litigation involving the use of the waters of the San Luis Rey River Basin between the City of Escondido/Escondido Mutual Water Company (Mutual) and the Vista Irrigation District (Vista), on the one hand, and the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands) on the other. The San Luis Rey River originates in northern San Diego County, California. In its natural condition, it flows through the La Jolla, Rincon, and Pala Indian Reservations on its way to the Pacific Ocean. Three other Indian reservations—the Pauma, the Yuma (which is under the jurisdiction of the Pauma Band) and approximately three-quarters of the San Pasqual—are within the river basin.

Since 1895, Mutual and its predecessor have diverted the waters of the San Luis Rey River out of the watershed to the community in and around the City of Escondido. The conveyance facility, known as the Escondido Canal, crosses parts of the La Jolla, Rincon, and San Pasqual Reservations. Various agreements and permits between the Secretary of the Interior, Mutual, and Vista purportedly grant rights of ways across these reservations and also provide that specified quantities of water are to be supplied to the Rincon and Pala Reservations. Pursuant to a license issued by the Federal Power Commission (now known as the Federal Energy Regulatory Commission), the diverted water also generates power

at Mutual's hydroelectric power sites located along the canal and at its termination.

Since the early 1920's, Mutual and Vista have impounded and diverted approximately 90 percent of the flow of the San Luis Rey River. Approximately 10 percent of the diverted flow has been delivered to the Rincon Reservation pursuant to a contract entered into by the Secretary of the Interior on behalf of the Rincon Band in 1914.[1] No other contract or agreement requires Mutual or Vista to deliver to any of the other reservations any of the diverted water even though all of the reservations have several thousand acres of yet undeveloped irrigable land whose natural source of supply would be the San Luis Rey River. Between 1894 and 1957, none of the Bands received any compensation for the use of its lands or for the diversion of the river. Since 1957, the license issued by the Federal Power Commission requires that the San Pasqual Band be paid $25 per year for the use of about three acres of its land.

The litigation over the use of the San Luis Rey River is pending in three forums: the United States District Court for the Southern District of California, the Claims Court, and the Federal Energy Regulatory Commission. The suit in the federal district court, filed in 1969 by the Bands and the United States on behalf of the Bands, challenges the validity of the contracts and permits executed by the Secretary of the Interior on behalf of the Bands,[2] seeks substantial damages against Mutual and Vista, and seeks a declaration of the full extent of the Bands' rights to the use of the waters of the San Luis Rey River. The action in the Claims Court, filed in 1950, is a suit by the Bands against the United States seeking damages for the alleged breach of its fiduciary obligation in allowing the San Luis Rey waters to be diverted away from the reservations. At this time, all but the La Jolla Band have settled their claims with the United States. In the matter pending before the Federal Energy Regulatory Commission, commenced in 1969, the Bands and the Secretary of the Interior are contesting the right of Mutual and Vista to occupy reservation lands under a license issued jointly to Mutual and Vista.[3]

S. 2676

S. 2676 implements a settlement agreement that was reached between the Bands, Mutual, and Vista. Instead of the Bands receiving only 10 percent of the diverted water (hereinafter referred to as "local water"), S. 2676 provides that the Bands will receive annually 50 percent of the flow of the river, which includes the water pumped from a groundwater basin above the reservations. In any one year, including a dry year, the Bands are guaranteed 50 percent of the average historically diverted flow (7,000 acre-feet). If the Bands choose not to put their share of the local water to beneficial

---

[1] See n. 2, infra.

[2] The district court has already entered an order voiding portions of the disputed contracts.

[3] This matter has gone through lengthy proceedings before the Commission, the Court of Appeals and the Supreme Court. The Supreme Court has remanded the case back to the Court of Appeals which, in turn, remanded it back to the Commission for further proceedings which have not yet begun.

use on their reservations, the bill obligates Mutual and Vista to purchase that water at a reduced rate below what they normally pay from an alternative source, i.e., 90 percent of the local market for the first 7,000 acre-feet per year and 80 percent for the remainder, if any, but substantially higher than the cost of developing the water.

All prior settlement attempts have failed because there is not enough water in the basin to satisfy the needs of the Bands, Mutual and Vista. S. 2676 authorizes the Secretary of the Interior to transport to the San Luis Rey Basin for the Bands' use additional water (22,700 acre-feet) from the Central Valley Project (CVP). S. 2676 obligates the Bands to pay the cost of transporting the CVP water to the Basin, including the cost of power to pump the water, and, in addition, to sell, at cost, approximately one-quarter (6,000 acre-feet) of the CVP water to Mutual and Vista as consideration for the Bands' use of Mutual's and Vista's dams and storage facilities, the canal, and the well field.

The United States' contribution is not in the form of a direct appropriation of federal funds to implement the settlement. S. 2676 obligates the Bands to reimburse the United States for all operation, maintenance and power costs associated with the development and transportation of water from the Central Valley Project at the same rate that the other irrigation project users pay to the United States. S. 2676, however, specifically exempts the Bands from reimbursing the United States for the costs of constructing the Central Valley Project. The CVP water will be transported to the San Luis Rey Basin through existing facilities that are owned and operated by the state of California, the Metropolitan Water District of Southern California, and the San Diego County Water Authority. The Bands are obligated to pay all costs associated with conveying the water through these facilities, and all costs, including construction costs, associated with delivering the water to the Bands' Reservations. The federal government is not responsible for constructing any new facilities under S. 2676. Therefore, the United States' contribution to this settlement is (a) the waiver of all Central Valley Project construction costs normally to irrigation project users and (b) the loss of that amount of revenue that the United States would have received if the project power were sold to preference customers. It is this Department's understanding that, at current rates. the total foregone revenue to the United States amounts to approximately $2 million annually.

This Department is of the opinion S. 2676 should be enacted. First, the litigation has been ongoing in one forum or another for over three decades and, if not settled with this bill, will likely continue for many years to come. During the course of this litigation the federal government has borne the cost of all fees of the United States' and Bands' expert witnesses, and, except for the Claims Court suit, the federal government has also paid the attorneys' fees of the Bands. If the litigation continues, the United States' payment of these costs will likewise continue. Second, if the litigation continues it is likely that the Bands and the United States on behalf of the Bands will be able to successfully demonstrate that there is a substantial number of acres within the Bands' reservations that could be economically irrigated with San Luis Rey water.

So that the Bands could put their decreed water to actual use, it is likely that the Bands would then seek federal funding for costly irrigation facilities. However, S. 2676 provides that the Bands may use Vista's and Mutual's existing facilities at a relatively low cost, i.e., a small percentage of the cost of operating and maintaining the water delivery system. Third, in response to the Bands' and the United States' demand for trespass damages and unauthorized diversion of water, Mutual and Vista are seeking, inter alia, an indemnification from the United States because they assert they relied upon the actions of the Secretary of the Interior in constructing their canal and storage facilities based on availability of supplies from the San Luis Rey River Basin. Finally, both the Mutual and Vista will likely claim that the United States is liable for all additional costs they will incur to replace that amount of water lost to the Bands through a court decree. At this time, it is not possible to project the extent of the United States' liability, if any, which we, of course, would contest. Nevertheless, these pending and potential claims against the United States would be settled if S. 2676 is enacted.

The enactment of S. 2676 would bring to an end all costly litigation—both existing and prospective—involving past and future use of the waters of the San Luis Rey River between the Bands, Mutual, and Vista. If the court were to award the Bands the full use of the waters of the San Luis Rey River, they would not have the ability to profit from their success absent further federal assistance. However, with the enactment of S. 2676, the Bands would realize an immediate financial gain by being in a position to put both the CVP and local waters to actual use without further federal involvement. By simply including the Reservations in the Central Valley Project service area, the Bands would have the opportunity for the first time since the unauthorized diversions began in 1895 to be in a position to become economically self-sufficient communities without disrupting Mutual's and Vista's existing obligations to their respective users.

We appreciate this opportunity to comment upon the legal ramifications of S. 2676. The Office of Management and Budget has advised this Department that there is not objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, WITNESS FOR THE DEPARTMENT OF THE INTERIOR BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS AND THE ENERGY AND NATURAL RESOURCES COMMITTEE—AUGUST 11, 1986

Mr. Chairman and members of the Committee, I am here today to offer the views of the Department of the Interior on S. 2676, the "San Luis Rey Indian Water Rights Settlement Act."

This bill would implement a negotiated settlement to litigation among the United States, the City of Escondido, the Escondido Mutual Water Company, the Vista Irrigation District, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission In-

dians in Northern San Diego California. In a suit brought by the Bands and the United States over 15 years ago, *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, Civ. Nos. 69-217-S, 72-271-S, and 72-276-S (S.D. Cal.), the Governemnt and the Bands questioned the authority of the local non-Indian water interests to use and convey water from the San Luis River and sought to have the Bands' water rights in that river protected. Preliminary decisions by the Court have been in favor of the Bands and the United States.

For the past year the parties to the litigation have concentrated their efforts on settlement negotiations. If enacted, S. 2676, and its companion bill H.R. 4468, would make possible the settlement of a long-standing Indian water rights dispute.

The Department of the Interior has played an active role in facilitating the negotiation of the San Luis Rey settlement because of the extensive Federal Indian water interests at risk. S. 2676 reflects the settlement principles agreed to by the parties to the litigation and appear to geneally conform to the Administration's policies for settlement of Indian water rights claims.

As described in more detail below, we fully support the the negotiated settlement of this Indian water rights litigation and therefore recommend enactment of S. 2676. We believe, however, that the implementation of the settlement would necessarily be subject to implementation of the Coordinated Operation Agreement (COA) for the Central Valley Project (CVP) and the State Water Project. Approximately one million acre-feet per annum of CVP water has not been allocated or contracted for use pending implementation of the COA.

Furthermore, we think it is important to point out that this settlement responds to a highly localized and unique set of circumstances. It would be a mistake, therefore, to view S. 2676 as a prototype or precedent for water rights settlements with other Tribes and in other States.

Background

The Mission Indian Bands were settled by the United States on five small and relatively dry reservations in the 1890's in present northern San Diego County. The San Luis Rey River is the principal surface water source of the area. Simultaneously, the neighboring non-Indians were making water appropriations under State law, developing and putting to sue the San Luis Rey water. A thirteen mile long gravity flow canal (the Escondido Canal) was built from the San Luis Rey River, across a mountain range, and into the next watershed. There, winter flood flows from the San Luis Rey were stored for distribution during the summer to the area that is now greater Escondido. The canal originates on the La Jolla Indian Reservation and crosses portions of the La Jolla, Rincon, and San Pasqual Reservations. In the 1920's local interests purchased the 42,000 acre Warner Ranch and built a dam and reservoir, thus controlling the headwaters of the San Luis Rey River.

Development of the local water delivery system was accomplished through a series of Federal licenses, permits, and contracts. These early Federal grants of authority thus far have been successfully challenged by the Bands and the United States in litigation.

Significant Features of the Settlement

I would like to take this time to highlight the elements of S. 2676 that are most significant to the Department's program for the protection and enhancement of Federal Indian water rights.

1. Equitable Allocation of Local Water.—Based on available data, the San Luis Rey River system yields an average of 18,000 acre-feet of water annually. The settlement gives the Bands the right to make beneficial use of about 9,000 acre-feet of local water each year and assures that, even in the most severe drought conditions, the Bands will be guaranteed a minimum of 7,000 acre-feet of local water annually, for use on their reservations.

In return, the local water users in the San Luis Rey system will retain an allocation of 9,000 acre-feet of local water, gain the opportunity to purchase a portion of the Bands' share of the local water, and gain the right to purchase an additional 6,000 acre-feet of water imported by the Bands from the Central Valley Project (CVP).

2. Imported Water from the Central Valley Project (CVP).—One of the major obstacles to settlement in the past has been the shortage of water available in the San Luis Rey River watershed to accommodate the combined needs of the Bands and the local communities. The settlement resolves this problem by introducing 22,700 acre-feet annually into the San Luis Rey watershed from the Central Valley Project, a federally developed water project in the Sacramento and San Joaquin River systems in northern California. Subject to the execution and implementation of the Coordinated Operation Agreement, there is an annual yield of one million acre-feet of CVP water which has not been allocated or contracted for use. In addition to the water, the CVP will provide the power necessary to deliver the water to the Bands.

One of the original authorized purposes of the CVP is to benefit Indian tribes. If this settlement is enacted, the Bands will be the first Indians to receive such benefits. The 22,700 acre-feet of water, which will be allocated to the Bands, represents less than a quarter of one percent of the CVP yield and about two percent of the firm CVP water supply that is not presently under contract.

3. Water Delivery System.—An important feature of this settlement is the willingness and ability of the parties to deliver the water through the use of existing Federal, State, and local canal and aqueduct systems. The Bands' San Luis Rey water allocation will be delivered to the reservations in the existing local canal network. The Bands' imported CVP water will be made available from CVP facilities in northern California and conveyed through the State aqueduct system in cooperation with other non-Federal interests to the San Luis Rey watershed. In short, neither the Bands nor the Federal government will have to construct new water distribution facilities in order to implement the settlement. When completed, this delivery arrangement by Federal, State and local water agencies should be an extraordinary example of cooperative water management.

4. Extensive Cost-Sharing.—The Administration's general policy is that if the United States is to make a significant financial contribution to an Indian water rights settlement, the non-Indians who

benefit by the settlement must also make a significant contribution. The local non-Indian water users have agreed to the following contributions to the settlement:

use of existing local water delivery systems to convey the Bands' share of the local water to the reservations;

purchase of water that is surplus to the Bands' needs on the reservations;

operate, maintain, and replace existing delivery systems for San Luis Rey water; and

pay 60 percent of the cost of constructing new facilities and maintaining and replacing structures necessary for optimum use of the Warner Ranch well-field in the upper reaches of the San Luis Rey watershed, and pay 50 percent of the annual power costs of operating the Warner Ranch wellfield.

Based on several assumptions, the local non-Indian contribution to the settlement may be estimated to range from $1.5 to $3.18 million.

The Administration's policy does not require Indian tribes to make a cost-sharing contribution to an Indian reserved water rights settlement. However, in this instance the Bands will make the following substantial contribution to the settlement:

pay the operation and maintenance costs associated with delivery of the CVP water through the Federal facilities, including the operation and maintenance costs associated with the power;

pay the operation and maintenance costs associated with conveying the CVP water through the non-Federal facilities to the reservation;

pay 50 percent of the annual power costs of operating the Warner Ranch wellfield and 40 percent of the cost of constructing the new facilities or maintaining existing facilities necessary for use of the wellfield; and

pay the entire cost of covering or placing underground the Escondido Canal where it crosses the San Pasqual Reservation.

Based on several assumptions, the Bands' total contribution to the settlement is estimated at $2,149,715 annually.

The Federal contribution to the settlement will be in the form of foregone revenue from two sources. First, the capital cost associated with the development of the storage and delivery facilities for the Bands' allocation of CVP water would be made nonreimbursable by Section 5(a)(2)(A) of the bill (approximately $3-4 per acre-foot annually).

Second, the energy component of the annual operation, maintenance, and replacement costs would be set at the project use rate. Use of the power required for the settlement will reduce the amount of surplus power now made available at higher rates for other purposes. Allocation of project use power for this settlement is generally consistent with the overall plan for the use of CVP power. Enactment of the settlement would mean that the power potential of the project would be applied to project purposes instead of being sold as surplus power. The foregone revenue associated with this aspect of the settlement is estimated at $2.5 million annually.

Notably, the settlement requires no new construction by the Federal government and requires no appropriation of Federal funds now or in the future.

5. Indian Water Authority (IWA).—The San Luis Rey Indian Water Authority is an inter-tribal governmental entity established by the Bands pursuant to duly adopted tribal ordinances. The IWA was chartered by the Bands with the full support of the non-Indian water users to provide a stable and orderly mechanism for carrying out the water management responsibilities of the Bands. S. 2676 provides statutory recognition of the IWA and reaffirms its status as a tribal authority possessing the powers necessary to acquire, use, and manage the Indian reserved water resources designated in the settlement agreement and this legislation.

6. Water Marketing.—S. 2676 authorizes the Bands, through the IWA, to market water resources for the economic benefit of the Bands. The Department supports the use of water marketing leases by tribes since this practice benefits tribal economic development. The Bands' ability to market water will provide them with a source of capital that obviates the need of the Federal government to make any direct financial contribution to the settlement. The water marketing authority would enable the Bands to raise revenue in excess of $2 million annually, which in turn will contribute to the capital and economic development of the reservations.

There is precedent for approval of Indian water marketing authority. The Southern Arizona Water Rights Settlement Act of 1982 (98 Stat. 1261) contains such a provision. The Fort Peck-Montana Compact, which has been approved by the Administration, also includes authority for water marketing agreements. And, recently the Administration reached an agreement in principle with the States of Colorado and New Mexico on an Indian water rights settlement that provides for water marketing.

Suggested Technical Amendments

We believe that certain amendments are necessary to clarify apparent legislative intent:

Section 5(b)(2)—The first sentence should be revised as follows: "The Indian Water Authority shall reimburse the United States for the operation and maintenance costs, but not for construction costs, incurred in providing the power referred to in paragraph (1). Such operation and maintenance costs shall be based on the project use rate for irrigation water pumping." This language is more precise and will prevent future confusion.

The bill as it stands is ambiguous as to the extent to which state laws and procedure would be applicable to the allocation of CVP water to the Bands. We recommend that this aspect of the bill be clarified in a way that is acceptible to the State of California and the parties to the settlement.

Conclusion

The Department supports S. 2676 for several reasons. First, the bill ensures the Bands of a water supply on terms that will be economically useful.

Second, Indian reserved water is provided in a manner that protects all existing uses of water by non-Indians. This goal is important to all interests.

Third, no new capital construction financed by the Federal government will be necessary. Indian and non-Indian water supplies will be conveyed by making use of existing water delivery systems.

Fourth, the overall settlement provides a substantial benefit to the reservation economies of the Bands relative to the costs associated with the settlement. The Bands will have water for their reservation and marketing authority to put the water to work for capital and economic developments on the reservations.

Fifth, the settlement includes substantial cost-sharing by the non-federal parties.

Finally, enactment of S. 2676 will resolve complex, costly and time consuming litigation and establish a basis for a cooperative partnership between the Bands and the non-Indian communities in the San Luis Rey watershed.

STATEMENT BY WILLIAM H. CLAGETT, ADMINISTRATOR, WESTERN AREA POWER ADMINISTRATION, U.S. DEPARTMENT OF ENERGY FOR THE COMMITTEE ON ENERGY AND NATURAL RESOURCES AND THE SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE, AUGUST 11, 1986

Mr. Chairman, it is a pleasure to have this opportunity to provide you with the views of the Department of Energy's Western Area Power Administration (Western) on S. 2676, a bill to provide for the settlement of water rights claims of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians in San Diego Country, California.

The bill would provide for a legislative settlement of a long-standing dispute between the Mission Indian Bands and certain water users ("local entities") in San Diego County, California. As the findings in the bill recite, the dispute arises out of the inadequate water supply in the San Luis Rey River, which has not been to serve both the needs of the Mission Indian Bands and the needs of the local entities.

In order to ameliorate that condition, certain water deliveries to the Indians are provided for in the settlement. In that regard one of the major features of the settlement is the provision that the Secretary of Interior deliver 22,700 acre-feet of water annually and in perpetuity from the Federal Central Valley Project (CVP) to the San Luis Rey Indian Water Authority in the vicinity of the Bands' reservations. The bill also contains specific provisions regarding how the electric power—which will be necessary to make such annual water deliveries—is to be provided. It is those provisions regarding power which involve the interests of the Department of energy acting by and through Western. Consequently, the comments set out hereinafter will be limited to that aspect of the bill.

Section 5(b) of the bill specifies two possible sources for the electric power to be used in making the annual water deliveries. To the extent that it is available, the bill directs that "project use power from the CVP" shall be used. However, the bill further provides that to the extent such power is unavailable from the CVP, then the Secretary of Energy is authorized to obtain or acquire such ad-

ditional power as may be needed to accomplish the required water deliveries until the power required can be made available from the CVP. The ramifications of the use of each of those two sources of power deserve comment.

The term "project use power" is defined in section 2(6) to mean "* * * CVP hydroelectric power and power from other sources used in the operation of the CVP irrigation facilities and for other purposes specifically authorized by Congress." The bill further provides, in section 5(b)(3), that in obtaining any needed additional power the Secretary of Energy may not use any power which is needed for other project use purposes, or until after the year 2004, from CVP firm power customers' contractual entitlements.

It should be noted that the "project use power" which would be used to deliver the settlement water is power that is excess to the immediate needs of the CVP. This power, but for such use in making those water deliveries, would have been banked with the Pacific Gas and Electric Company (PG&E) by Western pursuant to an existing contractual arrangement. One aspect of the arrangement is that excess energy delivered to PG&E by Western is deemed to be deposited to an Energy Account No. 2, and PG&E pays Western for the actual cost of the energy at that time. Western has the contractual right to repurchase from PG&E, and a first in-first out basis, the energy which has been deposited to that Account.

Since we currently anticipate that all of the power which will be needed for the water deliveries will be power which would otherwise have been deposited by Western with PG&E under the abovementioned arrangements, Western will forego the revenues which would have been received from the sale of such power to PG&E. While we do not object to the use of foregone power revenues in this particular Indian settlement, we wish to emphasize that this federal power subsidy is a unique situation and should not set a precedent for similar cases. The costs associated with the bill are estimated based on such foregone revenues, since they will not be available to help repay the government's investment in the CVP. Therefore, these foregone revenues are in actuality a part of the contribution of the United States to the settlement. Western estimates for foregone revenues at 35 mills ($0.35) per kilowatthour or, based on the need of 72.6 million kilowatthours of pumping energy, about $2.5 million annually. Western believes that in order to clarify the intent of section 5(b)(4)(B) provision should be made whereby such foregone revenues in accordance with section 5(b)(4) are permitted to be credited for book purposes as if they had been applied as repayment of the government's investment in the project. Unless such provision is clearly made, the lack of credit for such foregone revenues will tend to cause rates charged CVP power users to increase. This would be in conflict with the protection provided in subsection 5(b)(4)(B).

The bill also authorizes the Secretary of Energy to acquire or obtain additional power which is required to make the water deliveries to the extent that such power is not available from the CVP. Section 5(b)(4) further obligates the Secretary of Energy (and the Secretary of Interior) to take such steps as may be necessary so that the provision of power for the water deliveries will not result in any added power costs for either project use purposes or "(u)ntil after December 21, 2004, to Central Valley project firm power cus-

tomers to the extent of any contract or obligation in existence on the date of the enactment of this Act."

In the unlikely event that the Secretary of Energy, who would be acting by and through Western to purchased power solely to meet the requirements of this bill prior to the end of 2004, the question arises as to how the costs of such purchased power would be handled. The bill prohibits such purchased power expenses from being passed on to current firm commercial power customers so it would appear that there are only two possibilities. Either any such expense is intended to be borne by the United States until after 2004, or to be accumulated in some manner and recouped from future customers after the year 2004. We understand that the former interpretation is intended and that the language "until after December 31, 2004", in section 5(b)(4)(B) contemplates that any purchased power expense incurred after December 31, 2004, would affect the rates of firm commercial customers under contractual arrangements effective after that date.

Since any purchases of power made under section 5(b)(1) when CVP electric resources were inadequate would almost certainly be made from Energy Account No. 2 established under the contract with PG&E, some observations regarding that are appropriate. Current projections for meeting future energy needs of these customers showed that the entire amount of energy sold to PG&E for deposit into Energy Account No. 2 will be repurchased by Western by the late 1990's. However, these projections, which are based on current contractual commitments and the concept of depleting Energy Account No. 2 by the 2004, could be modified to accommodate this proposal. For example, these projections do not contemplate the full utilization of Western's Pacific Northwest/Pacific Southwest Intertie capacity. Full utilization of the Intertie could increase Western's purchases and accordingly increase Western's sale to PG&E, thereby extending the life of Energy Account No. 2 so that power would be available for any purchases required to deliver settlement water to the Indians.

The only other portion of the bill that raises concerns is the definition of project use power. It should be revised to make clear that the traditional definition of project use power is being expanded in this one case solely for the purpose of this bill. Accordingly, we would strongly urge the addition of the following language to line 1 on page 3: "(6) PROJECT USE POWER. For the purposes of this Act only, the term 'project'. * * *"

In summary, Western believes that the power provisions of the bill allow a workable means to deliver water from Northern California to the Mission Indians, and with the recommended specific language changes incorporated would have no objections to its enactment. Again, I appreciate the opportunity to comment on S. 2626.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of the rule XXVI of the Standing Rules of the Senate, it is the opinion of the Committee, that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

○